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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID MEINHARDT, KIRK KIM,  
CAMRON BAILEY, TIMOTHY AHEARN,  
and JILL AHEARN, on behalf of themselves  
and all similarly situated individuals,

Plaintiffs,

v.

CITY OF SUNNYVALE,

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY JUDGMENT  
AND UNPAID COMPENSATION UNDER THE  
FAIR LABOR STANDARDS ACT**

[29 U.S.C. § 201 *ET SEQ.*]

JURY TRIAL DEMANDED

PRELIMINARY STATEMENT

1. The Plaintiffs are employees of Defendant City of Sunnyvale (“the City”) and bring this action on behalf of themselves and other individuals similarly situated. This is an action for a declaratory judgment under 28 U.S.C. sections 2201 and 2202 and for unpaid overtime and other compensation, interest thereon, liquidated damages, costs of suit and reasonable attorney fees, and other relief under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. section 201, *et seq.*

JURISDICTION AND VENUE

2. Jurisdiction of this action is conferred on this Court by 28 U.S.C. section 1331, 29 U.S.C. section 216(b), and 28 U.S.C. section 1337. This Court has subject matter jurisdiction pursuant to 29 U.S.C. sections 207 *et seq.* Venue lies within this district pursuant to 28 U.S.C. section 1391.

PARTIES

3. Plaintiffs are current and former employees of the City.

4. Plaintiffs bring this action on behalf of themselves and other similarly situated individuals, who are non-exempt City employees due compensation under the FLSA on a variety of schedules including a partial overtime exemption under 29 U.S.C section 207(k) for fire protection and law enforcement personnel and non-207(k) schedules. The amount of payments due may vary by employee.

5. Those individuals constitute a well-defined community of interest in the questions of law and fact in this case. The claims of the represented Plaintiffs are typical of the claims of those similarly situated. Thus, the named Plaintiffs will fairly and adequately reflect and represent the interests of those similarly situated and have retained counsel competent and experienced in class action and FLSA litigation.

6. There is no conflict as to the individually named Plaintiffs and other members of the class with respect to this action or with respect to the claims for relief set forth herein.

7. Pursuant to 29 U.S.C. sections 216(b) and 256, the named Plaintiffs herein have executed and hereby file with the Court their consents in writing to become party Plaintiffs in this action, which is appended hereto as Exhibit A. When other individuals similarly situated join this action, their consent will be filed with the Court. These written consent forms set forth each Plaintiff's name and intent to be party to this lawsuit.

8. Defendant City of Sunnyvale is a political subdivision of the State of California, an "employer" within the meaning of 29 U.S.C. section 203(d), an "enterprise" under 29 U.S.C. section 203(r), and a "public agency" within the meaning of 29 U.S.C. section 203(x), and employed the Plaintiffs.



1           17.     Employers are allowed to exclude from the “regular rate” contributions they  
2     irrevocably make to a trustee or third person pursuant to a “bona fide plan” for providing health  
3     insurance benefits.

4           18.     The Department of Labor’s interpretation of the term “bona fide plan” is set forth  
5     in 29 C.F.R. section 778.215(a)(5), which states, in part:

6                   “The plan must not give an employee the right to assign his  
7                   benefits under the plan nor the option to receive any part of  
8                   the employer’s contributions in cash instead of the benefits  
9                   under the plan: Provided, however, that if a plan otherwise  
10                  qualified as a bona fide benefit plan under section 7(e)(4)  
11                  of the Act, it will still be regarded as a bona fide plan even  
12                  though it provides, as an incidental part thereof, for the  
13                  payment to an employee in case of all or part of the amount  
14                  standing to his credit.”

15           19.     In *Flores v. City of San Gabriel*, 2016 WL 3090782, the Ninth Circuit Court of  
16     Appeals held that payments to employees in lieu of health benefits were not excludable from the  
17     “regular rate” of pay under either 29 U.S.C. sections 207(e)(2) or (e)(4). With respect to the  
18     exclusion codified in 207(e)(2) and its companion federal regulation, the court noted “Under §  
19     778.224(a), a payment may not be excluded from the “regular rate” of pay pursuant to  
20     §207(e)(2) if it is generally understood as compensation for work, even though the payment is  
21     not directly tied to specific hours worked by an employee.” (*Id.*) Further, the Court held that  
22     cash payments in lieu of health benefits were not excludable from the “regular rate” under  
23     207(e)(4).

24           20.     Defendant’s past and current practice of computing overtime has impermissibly  
25     reduced the amount being paid to Plaintiffs and similarly situated individuals by failing to  
26     compute all statutorily required amounts into the “regular rate” of pay as defined by 29 U.S.C.  
27     section 207(e).

28           21.     As part of the compensation provided Plaintiffs and other similarly situated  
   individuals, Defendant has provided additional compensation including but not limited to a

1 “Cash in-Lieu of Medical Coverage” program for Employees that opt-out of medical benefits or  
2 reduce their medical coverage from full family or ‘employee plus one’ coverage.

3 22. Many such payments were made to Plaintiff Camron Bailey and similarly  
4 situated individual employees (not to a trustee or third person).

5 23. Defendant treated some of these payments to Plaintiffs and similarly situated  
6 individuals as wages for the purpose of tax withholdings.

7 24. Plaintiffs are informed and believe, and thereon allege, that payments Defendant  
8 made to Plaintiffs and other similarly situated individuals’ medical and other health and welfare  
9 benefits were not made pursuant to a “bona fide plan” within the meaning of 29 U.S.C. section  
10 207(e)(4) and 29 C.F.R. section 778.215. Because the remunerations paid to Plaintiffs in lieu of  
11 these benefits were compensation for work and were not made pursuant to a bona fide benefit  
12 plan, they must be included in the “regular rate” of pay for determining overtime compensation  
13 as required by the FLSA.

14 25. In addition to the hourly wages for regularly-scheduled hours, the City provides  
15 also Plaintiffs with additional compensation including, but not limited to, cash in lieu of holiday  
16 pay, in the amount equivalent to 4.15 hours of additional pay per period, which is provided to  
17 plaintiffs without regard to whether they work on the holiday or not.

18 26. At all times material herein, the Defendant’s practices did not include all of the  
19 required additional compensation in the calculation of the “regular rate” of pay for Plaintiffs and  
20 similarly situated individuals for the purposes of determining overtime compensation as  
21 required by the FLSA. The City has thus failed to appropriately calculate the applicable “regular  
22 rate” and to pay Plaintiffs and similarly situated individuals the required premium overtime rates  
23 for all hours of overtime they worked.

24 27. At all times relevant hereto, Defendant and its agents and representatives were  
25 aware of their obligations to properly compute and use the correct “regular rate” of pay in  
26 calculating overtime compensation owed to Plaintiffs and similarly situated individuals.

27 28. Plaintiffs are informed and believe, and thereon allege, that Defendant and its  
28 agents and/or representatives willfully and knowingly violated FLSA by continuing to exclude

1 remunerations from the calculation of Plaintiffs' and similarly situated individuals' "regular  
2 rate" of pay.

3 29. Defendant's continuing failure to properly compensate Plaintiffs and similarly  
4 situated individuals is not in good faith and is a willful violation of the FLSA as it applies to  
5 employees of local governments.

6 30. As a result of the foregoing violations of FLSA, Plaintiffs seek damages for  
7 unpaid overtime, interest thereon, liquidated damages, costs of suit and reasonable attorney fees  
8 pursuant to 29 U.S.C. section 216(b).

### 9 **FIRST COUNT**

#### 10 The City Has Violated 29 U.S.C. Section 207 by Failing to Accurately 11 Calculate Plaintiffs' Regular Rate and Overtime Rate of Compensation

12 31. Plaintiffs hereby incorporate by reference paragraphs 1 through 30 in their  
13 entirety and restate them here.

14 32. At all times material herein, Plaintiffs and similarly situated individuals have  
15 been entitled to the rights, protections and benefits provided under the FLSA, 29 U.S.C. § 201,  
16 *et seq.*

17 33. During the times where Plaintiffs and similarly situated individuals have worked  
18 hours in excess of their regular schedules, they have been entitled to overtime compensation at a  
19 rate of one and one-half times their regular rate of pay for each additional hour or fraction  
20 thereof worked. 29 U.S.C. § 207; 29 C.F.R. § 553.230. Plaintiffs and similarly situated  
21 individuals may also be entitled to overtime compensation under the MOU.

22 34. The "regular rate" of pay from which the premium overtime rate of pay for  
23 Plaintiffs and similarly situated individuals is derived must include "all remuneration for  
24 employment." 29 U.S.C. § 207(e). Such remuneration includes not only Plaintiffs' agreed  
25 hourly rates, but also pay premiums including, but not limited to, holiday in lieu pay, out-of-  
26 class pay, and special assignment pay, as well as compensation under City health and welfare  
27 benefits plans that are not "bona-fide" plans or any cash taken in lieu of receiving such benefits.  
28

1           35.     At all times material herein, the City has failed and refused to provide Plaintiffs  
2 and similarly situated individuals with overtime compensation at a rate of one and one-half  
3 times their regular rate of pay by failing to include such remuneration in calculating the regular  
4 rate.

5           36.     The City's refusal to provide overtime pay at the proper rate to Plaintiffs and  
6 similarly situated individuals for the hours they have worked in excess of their regular schedules  
7 wrongly deprives Plaintiffs and similarly situated individuals of the FLSA overtime  
8 compensation that is due to them at times material herein.

9           37.     At all relevant times, the City has been aware of the provisions of the FLSA.  
10 The City's actions and omissions as alleged herein were knowing, willful, bad faith, and  
11 reckless violations of 29 U.S.C. section 207 within the meaning of 29 U.S.C. section 255(a).

12           38.     As a result of the aforesaid willful violations of the FLSA, overtime  
13 compensation has been unlawfully withheld by the City from Plaintiffs and similarly situated  
14 individuals for which the City is liable pursuant to 29 U.S.C. sections 216(b) and 255, together  
15 with an additional equal amount as liquidated damages, interest, reasonable attorneys' fees and  
16 the costs of this action.

17           39.     The employment and work records for the Plaintiffs and those individuals who are  
18 similarly situated are in the exclusive possession, custody and control of the City, and the  
19 Plaintiffs are unable to state at this time the exact amounts owing to them. The City is under a  
20 duty imposed by the FLSA, 29 U.S.C. § 211(c), and the regulations of the United States  
21 Department of Labor to maintain and preserve payroll and other employment records.

22                               PRAYER FOR RELIEF

23           WHEREFORE, Plaintiffs and those individuals who are similarly situated request from the  
24 Court the following relief:

25           A.     A declaratory judgment declaring that the City has willfully, unreasonably,  
26 wrongfully, and without good faith, violated its statutory and legal obligations, and deprived  
27 Plaintiffs of their rights, protections and entitlements under federal law, as alleged herein;  
28

1 B. An order for a complete and accurate accounting of all the compensation to which  
2 Plaintiffs are entitled;

3 C. Judgment against the City awarding Plaintiffs monetary damages in the form of three  
4 (3) years' back pay compensation, liquidated damages equal to his/her unpaid compensation, plus  
5 pre-judgment and post-judgment interest;

6 D. An award of reasonable attorneys' fees, as well as costs and disbursement of this  
7 action; and

8 E. An award granting such other further relief as the Court deems proper.  
9

10 JURY TRIAL DEMAND

11 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs hereby respectfully  
12 request a trial by jury on all claims presented in this Complaint.  
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14 Dated: September 27, 2016

MESSING ADAM & JASMINE LLP

15  
16 By /s/ Gregg McLean Adam

17 Gregg McLean Adam  
18 Attorneys for Plaintiffs  
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